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IN THE

Supreme Court of the United States

OCTOBER TERM—1952

No. 291 Miscellaneous

LILLIAN LYNN,
Petitioner,

vs.

JAY J. LYNN,
Respondent.

On Petition for (1) a Writ of Certiorari to the Supreme Court and the Second Judicial District Court in the County of Washoe, State of Nevada, or in the alternative, (2) for an Order granting Leave to File and Petition for Reargument of Petitioner's Application for Certiorari to Review the Final Judgment of the New York Court of Appeals (342 U. S. 849).

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

1. Typewritten certified copies of the opinions of the Supreme Court of Nevada, dated October 17, 1952, and the Second Judicial District Court in the County of Washoe, State of Nevada, dated March 24, 1952, are submitted by the petitioner.

2. The decision of this Court denying petitioner's application for certiorari to the New York Court of Appeals is reported in 342 U. S. 849. The opinion of the New York

Court of Appeals (R. 161-168) * is reported in 302 N. Y. 193. The prevailing and dissenting opinions of the Appellate Division (R. 138-158) are reported in 275 App. Div. 269. The opinion of the Special Term of the New York State Supreme Court (R. 118-128) is reported in 192 Misc. 720.

Jurisdiction

As to the Application for Writ of Certiorari to the Nevada Courts

The jurisdictional requisites for review by this Court of the judgments of the Nevada courts are lacking, in that:

1. No final judgment has been rendered by the highest court of Nevada in which a decision could be had (28 U. S. C. § 1257).

2. The Nevada courts rested their decisions solely on adequate and independent grounds of state law.

As to the Application for Re-hearing of the Petition for Certiorari to the New York Court of Appeals

The petition for rehearing has not been timely made under Rule 33 of the Rules of this Court and no "intervening circumstances of substantial or controlling effect" have occurred since this Court denied petitioner's prior application for certiorari.

Questions Presented

The questions before this Court are:

1. Does this Court have jurisdiction to review the subject judgments of the Nevada courts?

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* References are to the pages of the Record filed in petitioner's first application for writ of certiorari (No. 711, October Term 1950).

II. Have substantial circumstances occurred since the denial of petitioner's prior application for a writ of certiorari to the New York Court of Appeals to warrant a rehearing?

Statement of Facts

The parties were married in 1926. They had one child, Janet who became of age in 1948 (R. 24); her rights were not involved in this action (R. 162).

On January 22, 1942, the petitioner-wife secured a decree of separation in the Supreme Court of New York County on the ground of abandonment (R. 35-44). The judgment awarded petitioner custody of the child (R. 42) and $85 per week "for her support and for the support, maintenance and education" of Janet (R. 47).

Subsequently respondent moved his residence to Nevada (R. 22) and in April of 1943 filed a suit, pursuant to the laws of that State, for absolute divorce on the ground of cruelty committed by petitioner at various times, and specifically in the period *subsequent* to the date of the separation decree (R. 27-29).

Petitioner made a timely general appearance through a Nevada attorney. Having chosen to contest the suit, she had full opportunity to litigate all the relevant issues in the divorce action and she took full advantage of her opportunity. She contested the action with resolution and tenacity (R. 23). Her answer in the Nevada divorce action put into issue every essential allegation of the complaint, including the husband's *bona fide* residence in Nevada (R. 27-28, 31) and cruelty committed *subsequent* to the date of the separation decree (R. 31). The answer also incorporated the findings of fact, conclusions of law and the judgment in the New York separation action as an affirmative defense of *res judicata* on the issue of cruelty occurring *prior* to the date of that action (R. 35-48).

Petitioner was present throughout the three-day trial; she took the stand personally and testified in her own behalf (R. 23).

The Nevada Court, on all the evidence, granted the husband a decree of divorce, without provision for alimony, upon findings of fact that: (1) the husband had been for the jurisdictional period a *bona fide* resident of Nevada (R. 50), (2) that the wife *subsequent* to the date of the New York separation decree practiced a course of extreme cruelty against the husband (R. 51); and (3) that the wife affirmatively and formally insisted that she was deliberately refraining from making any claim for alimony or support (R. 51). No contention is made that any act of the respondent contributed to the position taken by her in this regard.

From the judgment of the Nevada Court entered July 13, 1943, the petitioner-wife never appealed until the attempted appeal on May 27, 1952, which is made the basis for the within application (R. 23).

The respondent, after the divorce, continued to make payments of $85 per week to petitioner, in whose custody the child remained. Affidavits submitted on petitioner's own behalf freely stated that respondent, after the divorce decree, had clearly advised her, and she was therefore aware, that these payments were "voluntary and gratuitous" (R. 20).

On June 11, 1948, just before Janet would come of age (June 30—R. 24), petitioner in the New York County Supreme Court moved for an order to amend the prior judgment in the New York separation action to increase her payments from $85 to $200 per week (R. 4-5). Respondent opposed on the ground of the *res judicata* effect of the Nevada divorce (R. 23-24).

The New York Supreme Court at Special Term denied the wife's application, holding that the valid Nevada divorce

terminated the husband's obligation to pay alimony under the prior separation judgment (R. 118-128). The Appellate Division reversed by a sharply divided court, three justices concurring in a majority opinion (R. 138-153), and two justices joining in a dissenting opinion (R. 154-158).

The Court of Appeals unanimously reversed the Appellate Division and affirmed the Special Term (R. 161-168). It held that: (1) the personal appearance of the wife gave the Nevada Court jurisdiction not only over the marital status of the parties but also over the property rights inherent in that status and consequently made inapplicable the divisible divorce doctrine enunciated in *Estin* v. *Estin*, 334 U. S. 541; (2) under Nevada law a divorce overrides a prior support order and the Full Faith and Credit Clause requires New York to give to the divorce a like effect;* (3) this is so whether or not the issue of alimony was raised or litigated in the divorce action.**

Petitioner applied to this Court for a writ of certiorari, which was denied on October 15, 1951 (342 U. S. 849).

On December 8, 1951, petitioner served notice on respondent's attorney in Nevada that she would call up for hearing in the Nevada District Court a motion for a new trial, as to which she had apparently filed a notice of intention to move on July 17, 1943, but which she had not perfected and had allowed to lie dormant for a period of more than eight

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* It would also appear to be implicit in its decision that under New York law a divorce overrides a prior support order and hence that the Full Faith and Credit Clause requires New York to give no lesser effect to the valid decree of a Nevada court having full jurisdiction of both parties.

** The Court of Appeals stated by way of dicta (302 N. Y. at p. 204) that the Nevada court may possibly have jurisdiction, by implication, to adjudicate upon the question of alimony and might have the power to modify its decree, adding, however, that these "are, of course, matters for the Nevada court alone to decide."

years.* On March 3, 1952, petitioner moved the Nevada District Court for an order permitting her to amend the original notice of motion for a new trial to enable her to apply for alimony at the new trial, or in the alternative, to award petitioner alimony without a trial.

On March 12, 1952, respondent moved for an order dismissing petitioner's motion for a new trial.

All of the foregoing motions were heard together and the Second Judicial District Court of the State of Nevada, County of Washoe, entered a decision on March 24, 1952, denying petitioner's motions as fatally defective in several respects under Nevada law. It denied petitioner's motion to amend her notice of motion for a new trial because the proposed "amendment" was not a modification of any ground set forth in the original notice of intention to move, but was a new ground, and one upon which a new trial could not be granted, it had been waived and could not be added after the expiration of the statutory time allowed, and, finally, a new trial could not be granted to determine issues of fact not decided in the original trial. The Court denied petitioner's motion that the Court award her support without a trial because it was without jurisdiction to amend a judgment after the expiration of six months from its rendition and the allowance of alimony after the lapse of eight and one-half years would amount to a new judgment

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* Petitioner creates an erroneous impression in stating (Petition, p. 5) "that on July 13, 1943 an application had been made for a new trial in the wife's behalf *which application had never been decided.* Hence on December 8, 1951 counsel for the wife gave notice that on December 14, 1951 such undecided application would be called for hearing, etc." The record (opinion and decision of the Nevada District Court, March 24, 1952) indicates that petitioner, on July 17, 1943 filed a "notice of intention to move for new trial" which stated "that the motion would be made 'upon affidavits hereafter to be filed and served' and upon other things", but that the said motion was never perfected, in that "no affidavit in support of the motion so noticed has been filed". In other words, the application did not remain undecided by oversight but was never perfected by petitioner.

for which no statutory authority existed. It thereupon granted respondent's motion to dismiss petitioner's notice of motion for a new trial.

On May 27, 1952, petitioner appealed to the Supreme Court of the State of Nevada from the 1943 divorce decree and from the March 24, 1952 order dismissing the motion for a new trial. The respondent moved to dismiss her appeal. On October 17, 1952, the Nevada Supreme Court dismissed petitioner's appeal on the grounds that (1) "the appeal from the judgment was not taken within the time provided by law", and (2) because the petitioner had failed to file the requisite bill of exceptions, "the appeal from the order denying new trial must fail for want of supporting record".*

Neither the Nevada District Court nor the Supreme Court of Nevada based its decision on any federal or constitutional ground. They rendered their judgments solely upon the procedural requirements of the State of Nevada.

ARGUMENT

I

The jurisdictional requisites for review by this Court of the Nevada judgments are lacking.

1. The Highest Court of Nevada has not Rendered a Final Judgment.

The jurisdiction of this Court to review state court judgments extends only to final judgments "rendered by the highest court of a state in which a decision could be had" (28 U. S. C. § 1257). Where an appeal to the highest appellate court of a state in which a decision could be had is

* Petitioner glibly describes this dismissal as having been "upon the ground that it could not be entertained in the posture of the case as it then existed" (Petition, p. 6).

dismissed for failure to perfect the appeal according to state practice, "the case stands as though no appeal had been prosecuted from the judgment rendered by the trial court", and "it results that the statutory prerequisite for the exercise in this case of the reviewing power of this court is wanting" (*Newman* v. *Gates*, 204 U. S. 89, 95).

Neither the order of dismissal of a procedurally defective appeal, nor the lower court's judgment will be reviewed by this Court. In *McMaster* v. *Gould*, 276 U. S. 284, the petitioners' appeal from a decision of the New York Appellate Division was dismissed by the Court of Appeals, because the petitioners failed to obtain leave to appeal. On petition for a writ of certiorari, this Court held (pp. 286, 287):

> "And since the petitioners, when the Appellate Division refused them leave to appeal, did not make an application to the Court of Appeals for such leave, the judgment is not that of the highest court of the state in which a decision could be had. See *Newman* v. *Gates*, 204 U. S. 89, 95. In any respect we are without authority to review the judgment; and the writ is *Dismissed for want of jurisdiction.*"

To the same effect are:

Hammerstein v. *Superior Court of California*, 341 U. S. 491;
Matthews v. *Huwe*, 269 U. S. 262;
Harrington v. *Holler*, 111 U. S. 796.

In the instant case, the Supreme Court of Nevada dismissed petitioner's appeal on the grounds that appeal was not made within the statutory time and was not supported by the required bill of exceptions. Consequently, the judgments here sought to be reviewed are not those of the highest court of the State of Nevada and this Court lacks jurisdiction.

2. The Nevada Decisions Are Based on Adequate State Grounds Independent of any Federal Grounds.

The District Court of Nevada and the Supreme Court of Nevada ruled that under that State's rules of procedure, petitioner was not entitled to any remedy. In an analogous situation in *Loftus* v. *Illinois*, 334 U. S. 804, this Court held (p. 805):

> "If the Attorney General is correct and petitioner has sought to raise even a valid federal claim by way of an unavailable Illinois remedy, we have, of course, a judgment that rests on a non-federal ground calling for dismissal of our writ."

The rule that this Court will not review a state judgment determined by application of state law, and the reason for the rule, is well expressed in *Herb* v. *Pitcairn*, 324 U. S. 117, 125, as follows:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. [Cases cited.] The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitation of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights."

Since the Nevada Courts were able to dispose of all the issues raised by petitioner's various motions and appeals by reference to the rules of practice of that state, they were not called upon to make any decision with respect to any substantive constitutional or federal question of Nevada's obligation to give full faith and credit to the 1942 New York separation decree.

It is submitted that this constitutional question was so devoid in merit as to be almost frivolous, for petitioner in effect asserts that Nevada should accord full faith and

credit to a judgment of a lower court of New York, which judgment had been obliterated by the final adjudication of the New York Court of Appeals. It would appear from petitioner's brief that this assertion was injected in the hope that the mere mention of "full faith and credit" would atone for jurisdictional deficiencies. This Court has held "mere reference to a provision of the federal constitution, or the mere assertion of a claim under it" (*Sugarman* v. *United States,* 249 U. S. 182, 184) does not create a federal question sufficiently "substantial in character" as to warrant the granting of a writ of certiorari (*Zucht* v. *King,* 260 U. S. 174, 176).

II

The application for rehearing is not timely made and no "intervening circumstances of substantial or controlling effect" have occurred since the denial of petitioner's prior application for certiorari.

Petitioner's alternative application for a re-hearing of her application for writ of certiorari to the New York Court of Appeals is not timely made under Rule 33 of the rules of this Court. The order denying the original application for a writ of certiorari was made on October 15, 1951. Petitioner asserts that her tardiness should be excused because "the grounds for re-hearing arose * * * *after*" (p. 2) the denial of her first petition, contending that the courts of Kentucky in *Cooper* v. *Cooper,* 314 Ky. 413, have reached a conclusion opposite to that of the New York Court of Appeals in the instant case, and that as a result, there has arisen a conflict of authority.

1. The *Cooper* case was Decided Prior to the Denial of the Original Petition for Certiorari in this Case.

Cooper v. *Cooper* was decided by the Kentucky Court of Appeals on May 26, 1950, and a re-hearing determined December 15, 1950. The New York Court of Appeals

handed down its opinion in the instant case on March 15, 1951, three months *later.*

The Kentucky case, therefore, "is not an intervening circumstance" (Rule 33 of the Rules of this Court), occurring after the denial of the petitioner's prior application for certiorari and cannot be the basis for a re-hearing. The fact that this Court denied a writ of certiorari in the *Cooper* case, after denial of the writ in this case, can have no significance whatever. Likewise of no significance is the fact that *Hammer* v. *Hammer,* 278 App. Div. 396, aff'd 303 N. Y. 481, which cited the Court of Appals' decision in the instant case, was decided after the denial of petitioner's writ.*

2. The *Cooper* case is not in Conflict with the Decision of the New York Court of Appeals herein.

In the *Cooper* case, the Kentucky Court of Appeals held that a wife, who had personally appeared in a Florida action in which her husband was granted a divorce, was not precluded from recovering alimony in a Kentucky support action pending at the same time. The Kentucky court and the New York Court of Appeals in the instant case equally recognized the "command" of the full faith and credit clause.

In the *Cooper* case, the Kentucky court found that under Florida law, an independent action for alimony could be brought without seeking a divorce and that a divorce did not necessarily preclude the wife's right to alimony. Con-

* Parenthetically, the so-called "dilemma" of the wife when her husband institutes a divorce action in another state, which petitioner asserts (Petition, pp. 6-7) was pure dicta in the *Hammer* case. The actual holding granted the wife a temporary injunction in New York, restraining the husband from prosecuting the foreign divorce action until he had established the bona fides of his out-of-state residence. Incidentally, the so-called "dilemma" would appear to offer the affected spouse a choice available to few litigants—that of not only the forum, but of the extent of exposure.

sequently, it held the wife could recover support in Kentucky because, as it stated (p. 417):

> "Full faith and credit demands do not require that we give *greater force* and effect to the Florida decree and matters determined thereby than given it in Florida. This proposition is fundamental." (Italics added.)

In the instant case, the New York Court found the Nevada law (as contrasted with the Florida law, as found in the *Cooper* case), to be "not only that a divorce decree overrides a *prior support judgment* or order (see *Herrick* v. *Herrick,* supra, 55 Nev. 59, 68), but that * * * 'there can be no grant of alimony *after such* a divorce'. (*Sweeney* v. *Sweeney,* 42 Nev. 431, 438)" (R. 165). The New York court, although it necessarily reached a result different from that reached in Kentucky in *Cooper* v. *Cooper,* applied the same principle of law, namely, that the full faith and credit clause required it to give to the foreign decree the same force and effect as the divorce had in that state (R. 164).

Another significant distinction is that under Kentucky law, alimony is allowed in a separate action "subsequent to the dissolution of the marriage relation". In *Hanks* v. *Hanks,* 282 Ky. 236, cited in the *Cooper* case, a wife was granted alimony in an independent action long after a Kentucky divorce in which both parties had appeared. Consequently, the Kentucky court, in *Cooper* v. *Cooper,* was entitled under the full faith and credit clause to give to the Florida decree the same effect as "it gives a decree of its own with similar jurisdictional foundation". (*Estin* v. *Estin,* 334 U. S. 541, 552, 554; see Morris, *Divisible Divorce,* 64 Harvard L. R. 1287, 1298-1300; see also, comment on *Lynn* v. *Lynn* in 39 Georgetown L. J. 655, 656.)

In the instant case, the New York Court of Appeals held that the Nevada divorce terminated support obligations of a separation decree because under New York law "the divorce judgment breaks the marriage tie and thereby 'cuts

off and forbids in the future' any rights or obligations having their root in the marriage relation (*Matter of Ensign,* 103 N. Y. 284, 289)" (R. 165).

Thus, the Kentucky and New York courts are in precise agreement as to the interpretation of their obligation under the full faith and credit clause. They have reached different results simply because of the different local laws involved in each case and thus present no "substantial or controlling" conflict or circumstance.

3. The Alleged Divergence of Opinions is not within the Purview of Rule 38-5(b) of this Court.

Finally, even assuming a divergence between the courts of New York and Kentucky, Rule 38-5(b) of the Rules of this Court indicates that this Court is primarily concerned with the conflict of decisions, not among State courts, but rather among and between the Federal Courts of Appeal, not here involved.

III

The decision of the New York Court of Appeals is consistent with the decisions of this Court.

The real federal question which goes to the merits in this case, is: Did the New York Court of Appeals exceed its duty under the Full Faith and Credit Clause by holding that a valid Nevada divorce decree, granted upon the personal appearance and active participation of both parties, terminated the support provisions of a prior separate maintenance order, when that is the effect the divorce has in both the States of Nevada and New York?

This was the question presented in petitioner's first application for certiorari (No. 711, October Term, 1950) and this Court, by denying the petition, deemed it unworthy of review.

For the full discussion on this point and on the Full Faith and Credit question, this Court is respectfully referred to respondent's brief filed in opposition to petitioner's prior application for a writ of certiorari.

CONCLUSION

The petition for writ of certiorari to the Nevada courts should be denied for lack of jurisdiction. The petition for rehearing of the application for writ of certiorari to the New York Court of Appeals should be denied because it is not timely made and presents no new or substantial grounds which have arisen since the denial of the first petition.

Respectfully submitted,

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